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PAGE

## INDEX.



AUTHORITIES.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1937

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No. 313

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LONE STAR GAS COMPANY, *Appellant*,

v.

STATE OF TEXAS, ET AL., *Appellees*.

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**Appeal from the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin.**

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## SUPPLEMENTAL BRIEF FOR APPELLEES.

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*May it please The Court:*

Throughout this proceeding, from its inception, the appellant has alternated so often between wholly inconsistent theories of the case that we have had great difficulty in ascertaining what the appellant's attitude really is; and we have had difficulty in attacking its positions because it would not remain stationary long enough to be attacked. This difficulty has been intensified by appellant's reply brief, filed March 28, 1938.

## I. INTERSTATE COMMERCE.

At pp. 3-5 of appellant's reply brief, it complains that we have relied upon "matters outside the record" in referring to the record made before the Commission, and omitted in printing. We have made no statements as to what that record does contain. We have merely expressed our willingness that the Court should examine any part of that record, if it so desires. We have stated that the Commission record contains no suggestion by appellant of the interstate commerce defense, and appellant has not accepted our challenge to point out any place in that record wherein such defense was raised or suggested. Our statement that it was not raised or suggested before the Commission is conclusively supported by what appears in the printed record. (R. I, 305; II, 1496-1497; I, 124, 130, 136-137.)

Appellant urges that it was under no duty to disclose before the Commission its contemplated defense of interstate commerce, because the judicial review before the District Court was *de novo*. But a *de novo* judicial review of a rate order does not import that the parties are entitled to try the cause before the courts upon a totally new and fundamentally changed theory from that upon which it was presented to the legislative body. It only imports that each party is entitled to produce before the reviewing court evidence which has *newly developed*, or has been *newly discovered* without fault or negligence in failure to discover, after the close of the record before the administrative body. This distinction is made plain in *Western Distributing Company* v. *Public Service Commission of Kansas*, 58 Fed. (2nd) 241, 243, (aff. 285 U. S. 119, 76 L. Ed. 655). (See also the cases cited at p. 5 of our original brief.)

At p. 8 of the reply brief, appellant says that appellees have waived the estoppel by failure to plead and urge it specifically in the state courts. This contention is not sound. Appellees prevailed in the state courts, and are now entitled to urge such facts as are reflected by the rec-

ord, in support of the state court judgments. If appellees had lost in the highest state courts, and had now been urging estoppel without having specifically raised it in the state courts, then appellees' position might be different from what it is now.

At pp. 8-9 of the reply brief, appellant says it had no reason to anticipate that the Commission would make an order affecting all of its deliveries of domestic gas at the city gates in Texas regardless of the sources from which the gas was obtained. This claim comes with very bad grace from the Company. The Commission's opinion opens (R. I, 14-15):

> "On October 14, 1932, the Railroad Commission of Texas entered an order on its own motion, calling for a general investigation of rates and charges made by the Lone Star Gas Company for natural gas delivered at the city gate of towns and cities served by that Company. . . . . A copy of the order of October 14, 1932, and notice of a hearing to be held beginning November 1, 1932, in the City of Fort Worth, was sent to the Lone Star Gas Company. . . . . Accordingly, on November 1, 1932, the Company appeared."

Thus, it is plainly shown that the Company was explicitly put upon notice that the purpose of the Commission was to investigate, and make an order fixing, a reasonable gate rate for all domestic gas delivered by the Company at the city gates in all towns in Texas served by it; and no distinction was made as to the sources whence the gas might be obtained. Furthermore, throughout the seven months of hearings before the Commission, the Company itself as well as the witnesses sponsored by the Commission submitted only overall valuations of the Company's entire properties in both Texas and Oklahoma and as to its operating results in both states without attempting a segregation as between the two states upon any basis or as between purported intrastate and interstate operations. Thus, again, the evidence made no distinction as to the sources

whence the gas was obtained, and the Commission was permitted to conduct the entire proceeding upon the theory that it had the power to dispose of the matter in the very manner in which it later did; and this without the slightest suggestion of objection by the Company. It was only later in the District Court, that the Company for the first time raised the defense and stated that the Commission would not have entered the order that it did *"had it been advised or had it known* that it did not have the right to determine and enforce a rate applicable to all gas sold by the defendant." (R. I, 305.)

At p. 9 of the reply brief, appellant says that the Commission knew the Company was engaged in interstate commerce, because it is so recited in the opinion. But the expressions quoted from the Commission's opinion show clearly that what the Commission really intended by the term "interstate commerce" was the Company's intrastate operations in Oklahoma, over which the Commission recognized that it had no jurisdiction.

At pp. 5-7 of the reply brief, the Company asserts that the evidence taken by the District Court pertaining to the Company's pleas to the jurisdiction and in abatement is not proper and competent evidence for the consideration of this Court. The reasons stated are, that the evidence under these special pleas was taken without a jury and before a judge other than the one who presided at the jury trial which followed a short time later. Under these special pleas the Company attempted, unsuccessfully, to convince the District Court that it was without jurisdiction to hear the matter upon its merits at all, because of the claimed defense of interstate commerce. The proceedings had, and the evidence taken, under those pleas are plainly as much and as competent a part of the trial of this cause as were the proceedings had, and the evidence taken, during the later jury trial. The trial court did not exclude any part of this evidence, but expressly admitted and considered it, and overruled the Company's pleas upon the basis of it. Had the

Company's said special pleas been sustained at that stage by the District Court, it would have ended the proceeding then and there; and thus, by the Company's failure to raise this interstate commerce question before the Commission, the latter's entire labors and the vast expense thereof would have been totally lost. It ill becomes the Company to say that this evidence cannot now be considered. The Company's real reason for objecting to the consideration of its own evidence adduced under those pleas is that in the course of its testimony and evidence there submitted, it inadvertently made some very damaging admissions, which it sedulously avoided and tried to change and smooth over in the course of the subsequent jury trial.

At pp. 13-14 of the reply brief, the Company says that the order reduced its gross revenues by 20 percent. This is an exaggeration; for the order applies only to the domestic, and not to the commercial or industrial, sales at the city gates; nor to its rights of way sales; nor to its non-public-service operations. It says also that the order fixes its "compensation for transportation" both within and without Texas. This is a fallacy; for the order in reality only fixes the price to be charged by it for its *own commodity* upon simulated gate sales within the State of Texas, and does not fix "compensation for transporting" interstate, either for others as a common carrier for hire, or for itself. The cases, such as *Hanley* v. *Kansas City Southern Ry. Co.*, 187 U. S. 617, 47 L. Ed. 333, are plainly distinguishable from this. There, continuous interstate hauls were being made for hire by a common carrier whose business had been expressly embraced, as an agency or instrumentality of interstate commerce, by the terms of the Interstate Commerce Act itself, thus by competent legislation broadening the scope of national regulation beyond what perhaps would have been considered interstate commerce as an independent concept in the absence of federal statute. The case here is as if a farmer should raise apples in Oklahoma, and haul them in his own wagon into Texas, for the purpose of there selling

them in retail distribution directly to the consumers as a peddler about town. Fixing the price of the product, either piecemeal (step by step, as the Commission is doing here) or fixing the final and ultimate price to the consumer, is not a fixing of "compensation for transporting" in interstate commerce, but is only the permissible fixing of a reasonable price for the *commodity* to be sold in local Texas commerce. And such transporting across state lines of one's own commodities is not "commerce" with anyone—much less "interstate commerce"; but is only an incident to local commerce.

It is urged at pp. 13-14 of the reply brief that the order is a prohibited direct burden upon interstate commerce, the same as would be a 20 percent gross receipts tax levied by Texas upon the Company's revenues derived from its entire business both in Texas and Oklahoma. This contention is specious, because it overlooks the important consideration, pointed out by this Court in the recent case of *Western Livestock* v. *Bureau of Revenue of the State of New Mexico*,—— U. S. ——, 82 L. Ed. ——, No. 322, October Term, 1937. There, it is pointed out that the reason for striking down under the federal commerce clause gross receipts taxes levied by the states in many instances is that although the tax might be reasonable if levied only by one state, yet, if the one state has the right to levy the tax, all other states touched by the interstate commerce would, as of right, be entitled to levy a like, or even greater, gross receipts tax upon the same revenues; and thus, by multiple taxation the interstate commerce would be driven out of existence, and the local commerce of the respective states would thus be given an advantage over interstate commerce, totally fatal to the latter. Such is not the situation here; for no state except Texas can possibly tax or regulate the price of domestic natural gas delivered at the city gates in Texas. The case of *Western Livestock* v. *Bureau of Revenue, supra,* should be added to the citations under our Points XIV, XV, and XVIII, pp. 17-18, 18-20, and 23-26 of our original brief.

At pp. 12 and 19-20 of the reply brief, appellant suggests certain imaginary conflicts of interest, and of regulatory authority, which might conceivably arise between Texas and Oklahoma with respect to the case here under consideration; more especially the question of reasonable prices which might be charged for the gas in the respective states, and the question of apportionment of the supply of gas between the two states if it should become inadequate to meet the demands of both states. Neither of such situations, nor any similar situation, has arisen or is presented by this record.

With respect to the question of segregation between (1) the Texas and Oklahoma properties and operations, and (2) what the Company denominates "interstate and intrastate operations," the Company at p. 39 of the reply brief again urges its oft-repeated argument that the order is indivisible in character, and that it must stand or fall as a whole; and further, that the Company was not under the duty of rewriting the Commission's order, any more than were the reviewing courts. The argument that the order is indivisible and must stand or fall as a whole is totally unworthy of serious assertion, in view of this Court's many decisions that a legislative act, such as this, may be valid on its face, and as applied to particular situations and at particular times, but invalid in part as applied to other different situations and at other times. And even if it be true that neither the Company nor the courts are under any obligation to rewrite Commission's order, this certainly would not lift from appellant the duty of supplying to the regulatory body evidence upon which a proper and valid order could be written. In this connection, we point out that although the Company in all proceedings before the Commission had permitted the latter to proceed upon an overall and unsegregated basis in both states, yet, in the District Court its evidence in support of its defense of interstate commerce, asserted for the first time, in that court, attempted a purported method of segregation between what

it called "interstate and intrastate operations," which is very graphically made plain by the Company's own map, then introduced for the first time, which we have appended at the end of our main brief, delineating plainly, definitely and certainly, in colors, the zones and areas in which its operations were claimed to be wholly intrastate, interstate, and mixed, respectively. If any segregation within the Company's Zone C (see Company map at end of our main brief) was required, it certainly should have given the Commission the benefit of its theories so that the Commission would, at least, have had an opportunity to work out *some* practical basis for segregation within that zone; but this the Company wholly failed to do, although the record shows that it was working hammer and tongs upon that theory during the larger part of the time the Commission's hearings were going on (see our main brief, pp. 62-75, and especially 71-72).

The Company attempts to explain at great length its reasons for submitting to this Court, as an appendix at the end of its original brief, a totally different, deleted, and altered map, instead of the same map in zones and colors which it appended to its briefs in the Court of Civil Appeals and the Supreme Court of Texas. It has not yet, however, explained its reasons for wishing to present the case in a totally different light to this Court from that in which it was presented to the state appellate courts. The real reason is that the Company's theory of segregation became obviously untenable, and showed up too great a portion of its operations as being admittedly intrastate commerce and subject to state regulation; those in Zone A being admitted to be wholly so, and those in Zone C partly so. It showed also the utter impossibility of making any sort of workable segregation upon the Company's theories which would permit the regulatory authority and the courts to ascertain what portion of the domestic deliveries at each of the city gates within Zone C was Okla-

homa gas, Texas Panhandle gas, and West Texas gas, respectively, so that any effective regulation could be brought about within Zone C at all. Thus, it appears that the Company has been driven into abandoning totally its entire theory of segregation presented to the state courts; which has resulted perilously near in driving it also away from its entire claimed defense of interstate commerce. The Company is now attempting to sanctify, under the claim of interstate commerce exemption, its *entire* operations within Texas, and not simply a portion of those within the limited Zone C shown by its map in the state courts. Thus, it has attempted also to conceal and camouflage its entire failure to segregate that portion of the gas which it really claims is exempt as interstate commerce within Zone C from that which is admittedly intrastate commerce in Zones A and C.

In our statement and argument under our Points XX to XXIV, inclusive, pp. 27-31, 62-75, of our original brief, we neglected to point out that the Company's attempted segregation in the District Court failed also to take into consideration, and to exclude from its claimed "interstate operations," the large volumes of Oklahoma gas and the smaller volumes of Texas Panhandle gas coming through Line A, which is shown by the record to have been stored and brought to rest for a large part of each year in what is known as the "Miller Lease" near Petrolia, Texas. At p. 53 of our original brief, we show that for 1933, the total volume produced from Company reserves in Oklahoma and transported into Texas was only 613,780 MCF (R. III, 2165, 2124 A); and at p. 61 of our original brief, we show that for the same year the storage in the Miller Lease absorbed 500,000 MCF of the gas from Oklahoma and the Texas Panhandle claimed to be interstate gas. Notwithstanding the fact that this volume of stored Oklahoma and Texas Panhandle gas had clearly lost its original claimed interstate immunity (if such it ever really had) by being brought to rest for six months in storage in the Miller Farm, the Company includes this volume of gas, when withdrawn from

storage and run into Zone C, in what it claims to be its interstate operations.

This record reflects (see pp. 33-37 of our original brief) that the real and sole party at interest in this entire proceeding is the Lone Star Gas Corporation, a Delaware holding company with its nominal place of business in Wilmington, Delaware, but with its sole business domicile in Pittsburgh, Pennsylvania, which Corporation does not have a permit or right to do business in Texas, and has nominally no office or place of business or agents in Texas through whom it could be reached by legal process by the regulatory authorities or courts of the State except appellant and its affiliated distributing companies; but that in reality the Lone Star Gas Corporation, through its "dummy" affiliate corporations, which it both owns and controls as agencies or automatons, in reality carries on in Texas the admittedly intrastate business of purchasing, producing, transporting, and distributing locally to the consumers at the burner tips natural gas for domestic consumption in 275 cities and towns. The record reflects further that the Lone Star Gas Corporation, although it keeps in Dallas, Texas, a "dummy" or memorandum set of its own books in the possession, and for the guidance, of its affiliated underlying companies, the Lone Star Gas Company and the affiliated distributors, yet, it refuses to the State authorities access to these books for any purpose (R. III, 1640). It is said that these books were not material upon any question except management fees. But what about the question of the appellant's excessive claims for amounts of Federal income tax never paid to the Government, but set up in operating expense, nevertheless, in the amounts of hundreds of thousands per year? (See pp. 127-130 of our original brief).

It was asked from the Bench in argument whether the Commission had not treated the pipe line company and the affiliated distributors as being separate, distinct and unrelated corporate entities for purposes of fixing the gate rate and the burner tip rates separately, while at the same time

inconsistently considering the entire affiliated group as one unified and integrated set-up for the purposes of the interstate commerce question. The answer is that there has been no such inconsistency of treatment at any time.

In fixing the gate rate separately for the Lone Star Gas Company and later in separate proceedings and orders fixing the burner tip rates for the affiliated distributing companies in the 275 Texas cities and towns, the Company has been accorded exactly the same treatment that the Commission has accorded to another single corporation in the case of *State of Texas* v. *Public Service Corporation of Texas,* 88 S. W. (2d) 627 (writ refused). There the Public Service Corporation of Texas owned and conducted as a single operating unit the production, transportation and local distribution phases of the natural gas business, serving eight Texas towns, in seven of which the local distribution plants were owned and operated by the said Public Service Corporation of Texas. There the Commission proceeded exactly as it has done here; and proceeded to fix the rate at the city gates for the production and transportation phases without at the same time and in the same proceeding going further and fixing the burner tip rates in each of the seven towns where local distribution operations were carried on by the same company. The company attacked the Commission's right to do this, but such right was upheld by the highest state courts. Thus, it appears that there is nothing arbitrary or unjust in the Commission's proceeding likewise with this affiliated group of companies, which are to be considered as one, as it has done in the case of a single corporation.

The Lone Star Gas Corporation has seen fit to divide its entire integrated operations of purchase, production, transportation, and local distribution of domestic natural gas in Texas, into distinct departments or divisions; the purchase, production and transportation department, properties and operations of the integrated business being entrusted solely to its corporate agent, the Lone Star Gas

Company; and the distribution properties and operations being entrusted solely to its claimed separate and distinct corporate entities or agencies, the affiliated distributing companies in Texas. It so happens that this voluntary division of its properties, operations and business, by the Lone Star Gas Corporation, and its subsidiaries, coincides exactly with the division which the Commission has found it necessary and convenient to adopt for purposes of expediency and economy in fixing the uniform gate rate in Texas separately from the individual burner tip prices in each of the 275 Texas towns served by the Company's pipe line.

For the purposes of fixing the uniform gate rate, the only legal agent of the Lone Star Gas Corporation upon whom the Commission could lay hands in legal process was the Lone Star Gas Company, which confessedly had entire charge of the properties and operations up to the city gates; and it would be claimed by the entire affiliated group that the affiliated distributing companies had nothing to do with the operations up to the city gates. And likewise in burner tip cases it would be insisted by the entire affiliated group that only the affiliated distributing companies had anything to do with the distribution properties and operations. Thus, there is nothing inconsistent in the Commission's attitude in dealing with the Company only, in the operations up to the city gates, and in dealing separately and subsequently only with the affiliated distributing companies in fixing the burner tip rates in each of the 275 towns. The necessary segregation is thereby made between the properties and operations of the respective *departments* of the entire business along the very lines as set up by the Lone Star Gas Corporation itself and its affiliated companies; and in so doing, the Commission has never lost sight of the fact that the business is one integrated set-up owned, managed and controlled by the Lone Star Gas Corporation; nor has it failed, to the prejudice of any of the affiliated companies, to give proper effect to that fact, where it was properly mate-

rial. And certainly, there is no inconsistency or injustice to any of the affiliated companies in applying the principle of disregarding the corporate entities where it becomes material and appropriate, namely, in the question of interstate commerce.

## II. DENIAL OF "DUE PROCESS" OR "ADEQUATE JUDICIAL REVIEW."

In the Company's original brief at pp. 126-127, it very plainly specifies what it does and what it does not urge as a denial of due process or adequate judicial review. At p. 126, the Company says:

> "The point here made is not based upon the failure of the Court of Civil Appeals to exercise an independent judgment as to the facts or its failure to make findings settling the conflicts in the evidence referred to . . . Nor do we challenge here the proceedings in the State trial court as amounting to a denial of due process."

And at p. 127, it says:

> "What we do complain of is the judgment of the Court of Civil Appeals, which, in effect, deprived appellant of the judicial review accorded it in the trial court and placed it in the same position as if that review had been denied by the trial court. Appellant's complaint is not that the Court of Civil Appeals has erroneously declared the State law applicable to the judicial review of rate orders. Appellant's complaint is that the procedure, provided by the State, as expounded and applied against it in the instant case, denies it an adequate judicial review of the rate order. What the Court of Civil Appeals said on the subject of judicial review of rate orders is the law of the State, at least for the purposes of this case. And appellant's complaint is that the law of the State, as thus declared and enforced against it, amounts to a denial of due process."

At pp. 41-42 of its reply brief, however, the Company attempts to retreat from the above-quoted plain admissions and position, and to interpret and assert now its position as being quite different from that taken in its original brief.

Even allowing this shift of positions, however, and considering the Company's positions as asserted both in its original and reply brief, its whole contention boils down to the argument that the claimed denial of due process or adequate judicial review consists only in the holding of the Court of Civil Appeals that the evidence as a whole was legally insufficient to outweigh and overturn the presumed validity of the Commission's order, or to measure up to the *quantum* and *character* (or *quality*) of evidence necessary to raise issues of fact as to confiscation under the Federal Fourteenth Amendment, or unreasonableness and unjustness under Article 6059 of the state statutes, and was thus insufficient to support the jury's verdict. In short, the contention is that the denial of due process consists in the overturning or setting aside of the jury's verdict, and the failure to give it a jury trial on the facts, and the claimed failure to exercise an "independent judgment as to the facts."

The necessary effect of sustaining this contention on the Company's part would be: (1) To convert into a federal question, of denial of due process under the Fourteenth Amendment, what is (if it is an error at all) plainly only an error of state law; and the result of this would be that every error of state law committed by a state court would automatically and *ipso facto* become a denial of due process under the Federal Fourteenth Amendment, and this Court would thereby by compelled to sit in review over and to correct all claimed errors of state law committed by all state courts. (See our original brief, pp. 76-84). (2) To deprive the Commission's action and order of their well-established, and heretofore uniformly applied, presumptions of correctness; and to attach all of such presumptions, on the contrary, to the trial court's judgment. The effect of

this would be to abolish entirely the requirement of Article 6059 that a person complaining of the Commission's orders shall be required to show by "clear and satisfactory" evidence that the same are unjust and unreasonable; and to abolish also the rule heretofore well-established in the Texas decisions (See cases cited at pp. 78-79 of our original brief) that the question of the "clear and satisfactory" *character* and *quantum* of the complaining party's evidence is a preliminary *law* question for the courts to pass upon before the submission of any issues whatever to the triers of fact; and to abolish also the well-established, and heretofore uniformly applied, rule of law laid down by the decisions of this Court (See cases cited at pp. 85-86, 86-87, 88, 90, 90-91, and 95-96 of our original brief) to the effect that the evidence of confiscation under the Fourteenth Amendment must also be "clear and convincing," and such as would leave no reasonable doubt in the judicial minds. A further necessary result of the Company's contention would be that the results of the expert labors and judgment of the members of the Commission could in every rate case easily be overturned and the judgment of trial courts substituted therefor under evidence not measuring up to the law's required standard of *quantum* and *quality* (i.e., being "clear and satisfactory" or "clear and convincing." And we cannot emphasize too strongly that this preliminary legal analysis of the evidence is, under the cited decisions of this Court and the state courts, a preliminary *law* question for the courts to pass upon before any fact issues are raised or submitted in judicial reviews of Railroad Commission orders (whether involving confiscation or not). If this preliminary legal test be successfully passed by the evidence, then as shown by the quotation from the *Shupee* case (p. 78 of our original brief) the issues of fact will be submitted to the triers of fact and determined upon a preponderance of the evidence, in the usual way. This is but giving due weight and presumption of correctness to the findings and action of the expert legislative agency, arrived

at after due notice and full hearing. And, as shown by the quotation from the *St. Joseph* case (p. 79 of our original brief) this is not a denial of an "independent judicial judgment as to the facts" nor of any other Federal Constitutional right. The Company's contentions would result in making the trial courts the ultimate legislative rate makers, instead of the Commission of experts; and in that case, it would be better to abolish the expert Commission entirely, and to vest the legislative power of rate making directly in the trial courts themselves.

It is plain from the decisions of the highest state courts cited at pp. 78-79 of our original brief (more especially, *Railroad Commission of Texas* v. *Shupee*, 57 S. W. (2d) 295, 301, affirmed by the Supreme Court of Texas, 123 Texas 521, 528, 73 S. W. (2d) 505, 508), and from the holdings of the Court of Civil Appeals in the *Laredo* gas rate case, and in this case, that the intention of the Texas Legislature in enacting Article 6059, the article here involved, was to establish a different and more onerous rule in judicial reviews of orders of the Commission (whether involving confiscation or not) from the rule of ordinary preponderance of the evidence applied in other ordinary civil cases; and to establish the rule and requirement in all judicial reviews of actions and orders of the Railroad Commission, that the orders cannot be overturned upon a mere preponderance of the evidence as in other ordinary civil actions, but that they may be overturned, only after the trial and appellate courts are satisfied as a matter of preliminary *law*, upon analysis of the complaining party's evidence, that the same is sufficiently "clear and satisfactory" or "clear and convincing" *to the judges as a matter of law and not merely to the triers of fact*, that the expert evidence rests upon firm and satisfactory foundations of underlying factual data or experience.

This rule is essential to the preservation of the action of the Commission as a body of experts, as against attack and attempts to substitute for such orders the action and judgment of trial courts.

And that this rule, as prescribed by the Texas Legislature, and as interpreted and applied by the highest courts of Texas, is not inconsistent with any federal constitutional rights of the complaining parties, is plainly shown by the many decisions of this Court, laying down independently of statutory provisions the requirement that the evidence in cases of claimed confiscation or other deprivation of federal right must be "clear and convincing" and such as to meet to the satisfaction of this Court the requirement as to the acceptability of expert or other testimony in such cases.

This record reveals that the jury's verdict in this case, prior to the time it was rendered and made known to the Company, did not in the Company's estimation possess the sanctity and inviolability which the Company now claims for it under the Federal Fourteenth Amendment. At R. I., p. ii (index) and R. I., 191, it appears that the Company requested the trial court to submit to the jury 118 separate "special issues" (none of which is printed in this record, and of the failure to submit which the Company now makes no complaint); and at R. I., 184-192, this Court is given a limited sample of the numerous and voluminous objections and exceptions which the Company leveled at the trial court's charge and submission of issues to the jury. Thus, it appears that the Company was preparing to make attacks upon the court's charge and the jury's verdict from every conceivable angle, if the case should eventuate adversely to the Company; and it is only since the favorable nature of the jury's verdict and the District Court's judgment became known to the Company that they have in the Company's eyes acquired such great sanctity under the Federal Constitution. If the jury's verdict had been adverse to the Company, it would be up here now complaining with great bitterness that the jury's verdict was not binding upon anyone, and would be attacking it from every conceivable standpoint. The Company would be urging this Court, as we are now, to review the entire evidence and determine for itself whether there was confiscation.

It is further to be observed that the jury's verdict in this case cannot be binding upon anyone, for several reasons: (1) As we have urged in many forms heretofore, the evidence as a whole was totally insufficient as a matter of law to support the verdict; (2) The jury were not given any instructions in any form to the effect that they might, in arriving at their answer to the single special issue submitted, take into consideration the *average* operating results for the reasonable spread of years in evidence, from January 1, 1927, to April 30, 1934, inclusive; and under this Court's holding in the *Laredo* case, appellees would clearly have been entitled to an instruction to that effect. Thus, the jury's vision was limited strictly by the form of submission to the question whether the rate was unreasonable prospectively from the date of trial in 1934, forward, and the jury was not permitted to answer as to whether it was reasonable when considered in the light of the average operating results reflected by the exhibits and testimony in evidence over the reasonable spread of years from 1927 to 1934, inclusive.

The facts in this record, and the Company's contentions in the light of those facts, make peculiarily plain the unwisdom of establishing any other rule in the judicial review of orders of the Commission than that laid down by Article 6059, and the decisions of the hightest State courts interpreting and applying that rule; and they make plain also the absolute necessity of establishing, maintaining and applying such a rule (requiring something substantially higher than the ordinary quantum and quality of proof before overthrowing the actions and orders of the Commission) in order to preserve and uphold the expert judgment of the Legislative Commission as against attacks by ordinary superficial, specious, and unsatisfactory expert evidence such as submitted by the Company here, and of substituting for the expert judgment of the Commission the judgment of a trial court. Such a rule has been uniformly sanctioned and applied in the decisions of this Court in rate cases where confiscation has been claimed.

The Company's contentions further disregard the force of this Court's holdings that "clear and convincing evidence" is required to demonstrate confiscation, and more especially the holdings of this Court in the *Laredo* case, as follows:

> "With respect to the proceedings in the state courts, appellant urges that the case was not tried and determined as required by the state law, and we are referred to the state statutes and decisions of the Texas courts as to the proper procedure in the trial court and on appeal. It is not our function in reviewing a judgment of the state court, to decide local questions. We are concerned solely with asserted Federal rights." . . . "The final judgment of the state court in the instant case must be taken as determining that the procedure actually adopted satisfied all state requirements." . . . "As to the requirement of due process under the Federal Constitution, appellant contends that it was denied the independent judicial judgment upon the facts and law to which it was entitled." . . . "The proceeding in the state court undoubtedly purported to afford an independent judicial review. As the Court of Civil Appeals of Texas said in the instant case, the trial of the issue whether the rate was unreasonable or confiscatory was '*de novo.*' "

It is plainly shown by the discussion of the Court of Civil Appeals (R. V, 3354-3359) that the Court of Civil Appeals recognized that under the Federal decisions (*Ohio Valley Water Company* v. *Ben Avon Borough*, and others) the judicial review must be upon an "independent judgment as to the facts and law," and that such a review was accorded the Company in this case. And from the opinion of the Court of Civil Appeals (R. III, 3335, 3353, 3354, 3357, 3359-3370, especially 3369) it appears plainly that what the Court of Civil Appeals did actually hold in this case was that as a matter of law the evidence as a whole did not meet the required preliminary legal test as to *quantum* and *quality* necessary to overturn the presumed validity of the Commission's order, and this was adjudged as a matter of

law and *not* a matter of fact. That this procedure was permissible from the angle of state requirements is plainly shown by the judgments of the highest state courts in the cases cited at pp. 78-79 of our original brief, and in the *Laredo* case, and in the present case. That it does not contravene the requirements of the Federal Constitution is shown by the numerous decisions of this Court, more especially the passage from the *St. Joseph Stockyards Company* case, quoted at p. 79 of our original brief, and the quotation from this Court's decision in the *Laredo* case set forth at p. 80 of our original brief. These decisions show plainly that this Court has adhered to and applied that very identical principle in all rate cases of claimed confiscation and deprivation of other federal rights.

The Company claims that this Court has not the power to review the facts in cases arising from the state courts, because of the inhibition of the Seventh Federal Amendment. This overlooks the action of this Court in reviewing and analyzing the facts in the *Laredo* case, which this Court said (see p. 80 of our original brief) was done "not to determine the issues of fact raised on conflicting testimony or inferences, and thus to usurp the function of the state court as a trier of the facts, but to perform our own proper function in deciding the question of law arising upon the findings which the evidence permits."

Since this Court plainly exercises that function consistently with the requirements of due process under the Fifth Federal Amendment, this Court should certainly accord to the state courts the privilege of applying the same principle, as they have done, without impinging upon the Fourteenth Amendment.

As we view it, then, all questions go out of this case entirely so far as this Court is concerned, except the two issues, (1) as to whether the order was void in whole or in part, (and if so, in what particulars and to what extent) under the Federal Commerce Clause; and, (2) whether the evidence is such as to meet the requirement of being "clear

and convincing," under the well-established rule uniformly laid down and applied in the decisions of this Court, as to confiscation.

These questions this Court has the undoubted power to determine from a thorough review and analysis of the entire record; and this we not only invite but urge the Court to do, feeling confident that when the review is completed, this Court will agree with the judgments rendered by the highest state courts, that the evidence was insufficient as a matter of law, both as to quantum and quality, to demonstrate confiscation.

## III. CONFISCATION.

Upon the whole case, considering the wholly unacceptable and excessive claims and testimony of the Company as to annual depreciation requirements, improper and questioned items of operating expense (in both of which one dollar takes away the equivalent of a 6% annual return on $16.67 in the rate case) and considering the unacceptable character of the Company's evidence as a whole on all questions of valuation in the rate base, the evidence falls far short of being either "clear and satisfactory" under the state rule as to unreasonableness and unjustness, or "clear and convincing" under the well-established rule of this Court as to confiscation.

The Company urges that it was justified in saying in its original brief that the Commission's witness, Freese, allowed nothing for going concern value in his appraisal before the District Court. In the first place, this Court is not primarily concerned with the sufficiency of Freese's estimates for going concern value in the District Court, but only with the sufficiency of what the Commission actually allowed, in the light of the evidence as a whole in the District Court. And it conclusively appears from the Commission's opinion, and from the District Court record otherwise, that the Commission allowed fully and more than liberally in the rate structure not only for going concern value and every

other element of value but for all operating expenses, depreciation, depletion and amortization, and as to every ultimate and subsidiary element in the rate structure. What Freese's testimony in the District Court does show is this: *not* that he allowed nothing for *going concern value,* but only that he included nothing in his estimate and allowance of going concern value for *claimed losses of return and fixed charges on idle plant during the preliminary development period* in the early history of the Company's operations; his investigation having shown plainly that the Company had incurred no such losses. Freese's testimony is (see pp. 175-177 of our original brief) that he did allow fully for going concern value, though not in a separate lump sum estimate; whereas the Company (p. 145 of its original brief, and p. 77 of its reply brief) said that Freese *did not allow anything* for going concern value. The statements are totally erroneous and misleading.

In a brief of any reasonable length it would obviously be impossible for us to outline in detail all of the objectionable features and speculative, uncertain, and unacceptable bases and theories of approach in the Company's entire evidence on confiscation. We have attempted in our original, and in this, brief to outline enough of the higher points of objection to the Company's evidence to give this Court some insight into why the state appellate courts were justified in rejecting the entire evidence as failing to measure up to the requirement as to *quantum* and *character.*

In the Company's reply brief at p. 64, it sets forth a computation purporting to show upon various assumed hypotheses or bases certain low percentages of net return which would have resulted to the Company under a theoretical application of the 32c rate only over the period 1931 to March 31, 1934, inclusive. It will be observed in the first place that here again the Company has submitted the results only of depression years, including 1933, the warmest year in the history of the Company's operations. It is to be observed also by reference to the Company's Exhibit

37 (R. V, 3037-3039), on which one of the computations is founded, that the Company's engineer, Biddison, compiled this exhibit on August 30, 1933. Thus, it appears that the exhibit on which the Company's computation is founded was compiled subsequent to the close of the Commission's hearing on June 29, 1933, and before the Commission had even promulgated its rate order on September 13, 1933; and it appears that the Company, even before it knew what the Commission's order was going to be, was laying its plans and compiling exhibits to attack the Commission's order, whatever it might be, in the courts, upon the very grounds which it has urged in all of the courts since then.

The Company in constructing the table utilizes for rate bases the book costs at the end of each of the years shown instead of taking an average book cost for each year (Rate Base No. A). If an average rate base of book value had been taken each year instead of at the end of each year, and if cancelled and surrendered lease expense as found reasonable by the Commission, and corrections to normal temperature for the calendar year 1933 and for the year ending March 31, 1934, had been applied, rates of return after depreciation, of 5.81% for 1931; 6.06% for 1932; 5.27% for 1933; and 5.23% for the year ending March 31, 1934, would be shown.

It is also significant to note from the items reflected in the Company's table that although the Company states that "operating expenses" are utilized as found by the Commission, it includes the item of "Federal income tax" in the sum of $216,627.86 for 1931, $256,841.59 for 1932, $145,744.27 for 1933, and $175,769.90 for the year ending March 31, 1934, although the Commission very definitely excluded this item from allowable operating expense upon a finding that none would be due, and the Company's own expert, Hulcy, testified that only an amount of approximately $52,000 would be due by the Company for the year 1931 (R. I, 405-406) and although the Company has never paid any income tax to the Government (R. I, 405; R. III, 2224-2228).

An examination of our Tables I to V, inclusive, at the end of our original brief, will show that when the Company's excessive estimates as to annual depreciation accruals, and as to rate base valuations, and as to improper and questioned operating expenses are rejected (as they should be), and when reasonable amounts for such items, as found by the Commission or as estimated by the Commission's witnesses in the District Court trial, are substituted therefor, the record as a whole is absolutely insufficient as a matter of law to raise any issue of confiscation. Here again, we remind the Court that in our Tables I to V, inclusive, we have not deducted any of the improper and questioned items of operating expense referred to at pp. 116-130 of our original brief, except the item of management fees and certain parts of the donations. When these improper operating expenses are eliminated, they restore rightfully to the amounts available for return large sums at the ratio of $16.67 in the rate base to one dollar in the operating expense account.

We respectfully submit and pray, as in our original brief, that the case be affirmed with costs.

Respectfully submitted,

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